Supreme Court, U.S.
FILED

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No._____

In The

Supreme Court of the United States

October Term, 1999

MARY and LESTER FURLOW,

Petitioners,

v.

ALLIED CONVEYOR, Inc., and

DURR INDUSTRIES, Ltd.

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Whether the Appellate Court properly allowed the District Court to invoke Federal Rule of Civil Procedure 49 (b) to declare a finding mandated by a Illinois Pattern Jury Instruction to be a "Special Interrogatory" when the District Court specifically found that no "special interrogatories" were tendered by defendants.

2. Whether the Appellate Court had a duty pursuant to the Seventh Amendment and prior decisions of this Court to attempt to reconcile the jury's findings with the general verdict rather than destroy the general verdict.

3. Whether the Court erred by overturning a jury verdict in the amount of $1,050,000.00 when the United States Court of Appeals for the Seventh Circuit has previously ruled that the allocation of fault between individual tort feasors, each of whom is responsible to the plaintiff for 100% of the judgment; does not affect the right of the plaintiff to collect the judgment.

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I. Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a collision with the Seventh Amendment.

II. Pursuant to Federal Rule of Civil Procedure 49 (b). Special Interrogatories must be "upon one or more issues of fact the decision of which is necessary to a verdict."

III. In a diversity case, state law governs the substantive issues. Thus the Court must look to Illinois to determine whether any question asked by the verdict form is necessary to a verdict. If not, there are no special interrogatories to invoke Federal Rule of Civil Procedure 49 (b).

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Parent Companies

The parent company of Durr Industries Ltd., is Durr, Inc.. Durr AG, Stuttgart Germany, is a publicly held company which owns ten per cent or more of the stock of Durr Industries, Ltd.

Table of Authorities *page*

Cases

Gallick v. Baltimore and Ohio Railroad Co. 372 U.S. 108, 83 S. Ct. 659 (1963) *p. 20*

Atlantic and Gulf Stevedores, Inc. v. Ellerman Lines Ltd._369 U.S. 355, 82 S. Ct. 780, 7 L.Ed. 798 (1962). *pp 19, 20*

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353 U.S. 360, 361, 1 L.Ed. 2d 889, 77 S. Ct. 840 (1957) *p 20*

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Omar v. Sea Land Services Inc. 813 F. 2d 096 9th Cir. 1987) *p 21*

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*Turyna v. Martam Construction*_83 F. 3d 178 (7th Cir. 1996). *pp. 12, 19, 20*

*Jewell v. Holzer Hospital Foundation, Inc. Et al*_899 F. 2d 1507, 1510, (Sixth Cir. 1990) *p. 21*

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Rules and Regulations

F.R.C.P Rule 49(b) *pp. 6, 7, 12*

Statutes

28 U.S.C. 1254 *p. 2*

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Opinions Below

The opinion of the United States Court of Appeals for the Seventh Circuit is set forth in Exhibit A, p. 1a. The Judgment of the United States District Court for the Southern District of Illinois is set forth at Exhibit B pp. The District Court Order Denying Plaintiffs' Motion for Modification of Judgment is set forth at Exhibit C pp. The Seventh Circuit Order Denying Rehearing is set forth at Exhibit D p.

Statement of the Basis of Jurisdiction of the Supreme Court

The statutory provision for this Court's jurisdiction is 28 U.S.C. &1254. The United States Court of Appeals for the Seventh Circuit issued its Opinion in this case on December

14, 1998. Panel Rehearing and rehearing en banc were timely requested. Rehearing was denied on January 12, 1998. See Appendix at p. 1 This Petition was timely filed within 90 days of the Denial of Rehearing. The United States District Court for the Southern District of Illinois had jurisdiction pursuant to 28 USC 1332 (a).

Constitutional, Statutory, and Ordinance Provisions

1. **740 ILCS 100/1: Application of Act** & 1. This Act applies to causes of action arising on or after March 1, 1978.

100/2. Right of Contribution

& 2. Right of Contribution. (a) Except as provided in this Act, where two or more persons are subject to

liability in tort arising out of the same injury to person or property, or the same wrongful death, there is a right of contribution among them, even though judgment has not been entered against any or all of them.

(b) The right of contribution exists only in favor of a tortfeasor who has paid more than his pro-rata share of the common liability, and his total recovery is limited to the amount paid by him in excess of his pro-rata share. No tortfeasor is liable to make contribution beyond his own pro-rata share of the common liability.

sub paragraphs (c) through (f) are not relevant to the instant case, and are set forth in the Appendix.

100/3 Amount of Contribution

& Amount of Contribution. The pro-rata share of each tortfeasor shall be determined in accordance with his relative culpability. However, no person shall be required to contribute to one seeking contribution an amount greater than his pro-rata share unless the obligation of one or more of the joint tortfeasors is uncollectible. In that event, the remaining tortfeasors shall share the unpaid portions of the uncollectible obligation in accordance with their pro-rata liability.

100/4 Rights of plaintiff unaffected

& 4. Rights of Plaintiff Unaffected. A plaintiff's right to collect the full amount of his judgment from any one or more defendants subject to liability in

tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this Act.

100/5 Enforcement

& 5. Enforcement. A cause of action for contribution among tortfeasors may be asserted by a separate action before or after payment, by counterclaim or by third-party complaint in a pending action.

2. **Federal Rule of Civil Procedure 49 (b)** States:

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the

decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant o rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58, in accordance with the answers notwithstanding the general verdict, or the court may return the jury for

further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

3. **735 ILCS 2-1117**

Joint Liability. Except as provided in Section 2-118, in actions on account of bodily injury or death or physical damage to property, based on negligence, or product liability based on strict tort liability, all defendants found liable are jointly and severally liable for plaintiff's past and future medically related

expenses. Any defendant whose fault, as determined by the trier of fact, is less than 25% of the fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be severally liable for all other damages. Any defendant whose fault, as determined by the trier of fact, is 25% or greater of the fault attributable to the plaintiff, the defendants sued by the plaintiff, and any third party defendant who could have been sued by the plaintiff, shall be jointly and severally liable for all other damages. **Held invalid by the Illinois Supreme Court in** *Best v. Taylor Machine Works* 179 Ill. 2d 367,

689 N.E. 2d 1057, 228 Ill. Dec. 636 (1997)

Statement of the Case

This action was brought to recover damages arising out of injuries sustained by Mary E. Furlow in the course of her employment at Nascote Industries Inc., in Nashville, Illinois. Mary E. Furlow filed a complaint containing counts in strict products liability and negligence against Allied Conveyor, Inc., and Durr Industries, Inc..

The District Court had jurisdiction over the above entitled cause pursuant to Title 28 United States Code Section 1332 (a)

Allied and Durr filed complaints for contribution against Nascote

Industries, Inc., Mary Furlow's employer at the time of injury, pursuant to *740 ILCS 100/1 et seq*

The cause was tried before a jury, the jury returned a verdict for the plaintiffs and against defendants Allied Conveyor Inc., and Durr Industries, Inc. Pursuant to the Verdict Form D, an Illinois Pattern Jury Instruction, the jury was directed to apportion fault among the parties. Pursuant to **740 ILCS 100/1: et seq**, and decisions of the Illinois Supreme Court, and the United States Court of Appeals for the Seventh Circuit, the apportionment of fault only arises after one tortfeasor has paid more than his pro-rata share of the common liability. No Special Interrogatories were tendered by the

parties to the appeal. The District Court found that the language requesting apportionment of fault in the Verdict Form D constituted a special interrogatory pursuant to Federal Rule of Civil Procedure 49 (b). The District Court entered judgment for the defendants, and against the plaintiffs. From the entry of judgment plaintiffs brought a timely appeal.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment, on December 14, 1998, (Appendix p.) and denied Plaintiffs' Petition for Rehearing on January 12, 1999. (Appendix p.) From the denial of Petition for Rehearing Plaintiffs bring this timely *Petition. for a Writ of Certiorari*

Argument

I The Verdict Form D is not a general verdict form with special interrogatories.

The District Court improperly held that the language in Verdict Form D, an Illinois Pattern Jury Instruction, directing the jury to allocate fault among all persons responsible for causing Mary Furlow's injuries constituted special interrogatories pursuant to Federal Rule of Civil Procedure 49 (b).

Special interrogatories must be "upon one or more issues of fact the decision of which is necessary to a verdict." Rule 49 (b) *Turyna v. Martam Construction Co. 83 F. 3d 178, (7th Cir. 1996)*

The case at bar is a diversity

case. Illinois law applies to the substantive issues. *M.T. Bonk and Company v. Milton Bradley Company and Hasbro Inc.* 945 F. 2d 1404, 1406, (7th Cir. 1991). Thus the Court must look to Illinois law to determine whether any question asked by the verdict form is necessary to a verdict. If not then there are no special interrogatories to invoke Federal Rule of Civil Procedure 49
(b). The verdict form directs the jury to find the per centage of fault attributable to each person or entity who proximately caused plaintiffs' injuries. (App. p. Verdict Form D) The jury entered per centages as follows; Mary Furlow 40%, Allied Conveyor 0%, Durr Industries 0%, Nascote 60 %.

The issue was addressed in *Lilly v. Marcal Rope and Rigging, Inc.* 289 Ill. App. 3d 1105, 682 N.E. 2d 581, 224 Ill. Dec. 920, (5th Dist. 1997, Appeal denied 175 Ill. 2d 529). In Lily the jury returned a verdict in the plaintiffs favor for $ 1,200,005. On the contribution claim the jury attributed 90% of the fault to the employer, Granite City Steel, and 10% to the defendant, Marcal Rope and Rigging. Marcal asked the court to reduce the judgment because under **735 ILCS 2-1117**, Illinois Code of Civil Procedure; Marcal claimed to be severally liable for Lilly's injuries. Section 2-1117 provided that any tort feasor found to be less than 25% at fault was severally liable. The Court

held that an employer is not a "third party defendant who could have been sued by a plaintiff" thus Marcal was jointly liable for all damages sustained by the plaintiff. *Lilly at 289 Ill. App. 3d 1116.*

The question to be answered, said the Court, is "Whose fault is to be counted in determining whether any particular defendants fault exceeds 25% of the total. The court answered that the employer's fault is not to be counted for this purpose. Lily at 289 Ill. App. 3d 1110. The Court found that the *Contribution Act, 740 ILCS 100/2,* is concerned with sorting out the relative rights of multiple defendants after the plaintiff has collected from among those defendants who are each fully responsible for all

of his damages. *Lilly*_289 Ill. App. 3d 1112. See also *Best v. Taylor Machine Works* 179 Ill. 2d 367, 689 N.E. 2d 1057, 228 Ill. Dec. 636 (1997): A concurrent tort feasor is liable for the whole of an indivisible injury when his negligence is a proximate cause of that damage. The fact that it may be possible to assign some percentage figure to the relative culpability of one negligent defendant as compared to another does not in any way suggest that each defendant's negligence is not a proximate cause of the entire indivisible injury." *Best at 179 Ill. 2d 427.*

The comparative fault of Nascote is not considered with respect to entry of judgment. This leaves 60% of fault to be allocated between Durr and

Allied. The Illinois Contribution Act 740 ILCS 100/1 et seq provides in part:

100/3 (b) The right of contribution exists only in favor of a tort feasor who has paid more than his pro rata share of the common liability,....

100/4 Rights of Plaintiff unaffected. A plaintiff's right to recover the full amount of his judgment from any one or more defendants subject to liability in tort for the same injury to person or property, or for wrongful death, is not affected by the provisions of this act.

Nascote Industries, Plaintiff's employer, was not a "third party defendant who could have been sued by

the plaintiff." Nascote's per centage of fault is not included in the Joint Liability Act equation set forth in **Ill. Rev. Stat. Ch. 110 Para. 2-117, 1989, 735 ILCS 5/2-117.**

Only the comparative fault of the Plaintiff, and the Defendants sued by the Plaintiff are considered.

Only later in the process does the contribution act allocate responsibility among parties who have been found to be the proximate cause of the full injury. *Jansen v. Aaron Process Equipment Company, Process Equipment Company v. Luxembourg Cheese Factory, Inc.* 149 F. 3d 603 (7th Cir. 1998)

In the instant case, as in *Jansen* the jury found Durr and Allied

each 100% responsible for plaintiff Mary E. Furlow's injury. The allocation of fault is not *"a question the answer to which is necessary to a verdict " thus there is no special interrogatory to invoke Federal Rule of Civil Procedure 49 (b).*

II. Assuming for the purpose of argument that the Verdict Form D does contain Special Interrogatories pursuant to Federal Rule of Civil Procedure 49 (b) entry of Judgment for the Defendants was improper.

Where there is a view of the case that makes the jury's answers to special interrogatories consistent, they must be resolved that way. For a search for one possible view of the case which will make the jury's finding inconsistent results in a

collision with the Seventh Amendment *Atlantic and Gulf Stevedores Inc. v. Ellerman Lines Ltd.*_369 U.S. 355, 82 S. Ct. 780, 7 L.Ed. 798 (1962).

When faced with interrogatories that might conflict with a general verdict, the court must take the view of the case that reconciles the interrogatories with the general verdict. *Turyna v. Martam Construction Company* _83 F. 3d 178 (7th Cir. 1996).

A special interrogatory must exhaust every possible ground upon which a verdict could be based in order to overturn a general verdict. *Arnold v. Panhandle and Santa Fe Ry 353 U.S. 360, 361 1 L. Ed. 2d 889, 77 S. Ct. 840 (1957).*

Gallick v. Baltimore and Ohio Railroad Co. 372 U.S. 108, 83 S. Ct.

659 (1963) Omar v. Sea Land Services Inc. 813 F. 2d 096 9th Cir. 1987)

Answers do not present a square conflict with the verdict where they do not exhaust all possible grounds on which verdict could be based; where answers are inconsistent with verdict, verdict may be upheld if there is a there is a possible basis for_verdict that was not addressed by jury interrogatories. *Jewell v. Holzer Hospital Foundation Inc., Et al 899 F. 2d 1507, 1510 (Sixth Cir. 1990).*

The District Court searched diligently for the one view of the case which overturned the jury verdict. The jury found that Allied and Durr were liable to the plaintiffs. (Verdict Form D

appendix p.) There is nothing ambiguous about the jury's Verdict for the Plaintiffs and against the Defendants.

VERDICT FORM D

"We the jury find for the plaintiffs and against the following defendant or defendants:

Allied Conveyor Inc. Yes_X_ No__

Durr Industries , Inc. Yes X No__

We further find the following:

First: Without taking into consideration the question of reduction of damages due to the fault of Mary Furlow, if any, we find that the total amount of damages suffered by the plaintiffs as a proximate

result of the occurrence in question is $1,750,000.00.

Page Two:

Second: As to the contribution claims against third party defendant, Nascote Industries, we find as follows:

For Allied Conveyor Inc., and

against Nascote Industries, Inc. Yes X No___

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For Durr Industries, Inc. and

against Nascote Industries, Inc. Yes X No___

Third: Assuming that 100% represents the total combined fault of all persons or entities whose fault

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proximately caused plaintiffs' injuries, including Mary Furlow, any defendant whom you have found liable and any third party defendant you find liable, we find the per centage of fault attributable to each as follows:

(a) Mary Furlow 40%

(b) Allied Conveyor Inc. 0%

(c) Durr Industries, Inc. 0

(d) Nascote Industries Inc. 60%

_____TOTAL 100%

(Instructions to Jury: If you find any defendant not liable to the plaintiff, or that any third party defendant was not at fault in a way that proximately caused plaintiff's injury, or if you find that the plaintiff was not contributorily at fault, then you should enter a zero (0) as to that person or persons.)

Fourth: After reducing the plaintiffs' total damages by the

percentage of fault, if any, of Mary Furlow, we assess plaintiffs' recoverable damages in the sum of $1,050,000.00.

(Signatures)

The Jury Note

The jury note states: "Judge Stiehl We are finding Mary Furlow 40% Responsible and finding Durr and Allied against Nascote. I would like to make sure we have the Form D Filled out correctly.

William L. Mullins

The Court's Response

The Court replied as follows:

June 2, 1997

Ladies and Gentlemen:

I am sorry but I cannot respond to your request. Please review the applicable instructions and apply them to your understanding of Verdict Form D, and then complete the Verdict Form D accordingly.

s/William D. Stiehl
Judge

(App. p.

The District Court found that the jury intended to hold Nascote alone liable.

The Court's Conclusion is not supported by the plain language of the note; or the Verdict Form D.

The conclusion reached by the District Court requires a finding that the jury disregarded the Court's instructions. The theory under which jury instructions are given, and

reviewed on appeal, provides that juries act in accordance with the instructions given them and do not base decisions on legal questions as to which they are not instructed. *City of Los Angeles et al v. Heller* 475 U.S. 796, 106 S. Ct. 1571, 89 L. Ed. 2d 806 (1986).

Conclusion

The Decision of the Seventh Circuit is in direct contravention of prior decisions of this Court; and of the Seventh Circuit, and other Circuits which have followed the decisions of this Court. It is a departure from the accepted and usual course of judicial proceedings. If the Decision of the Court of Appeals is allowed to stand defendants will be encouraged to engage in forum shopping

to obtain a favorable result in the Federal Court which would be unavailable in the State Court. For the reasons and authorities cited above this Honorable Court should enter an order directing Judgment for the Plaintiffs on Summary Disposition on the Merits. In the alternative, this Honorable Court should grant Certiorari pursuant to its supervisory power to review the important question of the abuse of the Federal Rules of Civil Procedure to substitute the opinion of the court for the decision of the jury.

Respectfully Submitted,

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